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In The

Supreme Court of the United States

ADAM VAN SUSTEREN,

Petitioner,

v.

BILL JONES,
Secretary of State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

I

QUESTIONS PRESENTED

Under California Elections Code § 8001(a)(2) all candidates who switch political parties less than one year before a primary election are barred from obtaining ballot access even if such candidates only attempt one run at office and meet all Constitutional requirements. The questions presented are:

1. Whether Section 8001(a)(2) is an unconstitutional provision because it prevents a political party from taking internal steps to allow a candidate who was previously registered with another political party to obtain ballot access as its chosen candidate, just as *Tashjian v. Republican Party of Conn. et al.*, 479 U.S. 208 (1986) allows political parties to change their rules to allow similarly situated voters to partake in the primary election.

2. Whether a case regarding independent candidates, *Storer v. Brown*, 415 U.S. 724 (1974) completely controls political party association right cases and thus nullifies the requirement for Strict Scrutiny analysis.

3. Whether *Storer* has been partially overruled in *Tashjian* and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and how the present case can be used to reconcile and clarify the conflicts created.

II

PARTIES TO THE PROCEEDING

Petitioner is Adam Van Susteren. The named Respondent is Bill Jones, former Secretary of State of California (Kevin Shelley is the current Secretary of State of California).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered June 6, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is published as *Van Susteren v. Jones*, 331 F.3d 1024 (9th Cir. 2003), and is reprinted at Appendix A. The Ninth Circuit's order denying rehearing and rehearing en banc (App. C) is not otherwise published. The District Court's opinion denying Petitioner's motion for summary judgment and granting Respondent's motion for summary judgment (App. B) is not otherwise published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered into on June 6, 2003. Petitioner filed a timely Petition for Rehearing En Banc which was denied on July 23, 2003. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of California Elections Code § 8001(a)(2) provides:

> No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, by a candidate unless... the candidate has not been registered as affiliated with a qualified political party other than that political party the nomination of which he seeks within 12 months, or, in the case of an election governed by Chapter 1 (commencing with Section 10700) of Part 6 of Division 10, within three months immediately prior to the filing of the declaration.

The relevant provision of California Elections Code § 8301 states:

> A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his or her party nomination at the primary election, is ineligible for nomination as an independent candidate.

STATEMENT OF THE CASE

On September 30, 2001 Adam Van Susteren ("Petitioner") was informed that he would be unable to obtain ballot access for the 2002 Congressional election as a Libertarian candidate because he did not meet the State's disaffiliation requirement. Petitioner filed a complaint for injunctive relief on October 2, 2001, in the United States District Court For The Southern District Of California based on the grounds that the disaffiliation provision infringed upon his First Amendment Association rights, rights to equal protection under the Fourteenth Amendment, and as a violation of the Qualifications Clause. The federal district court had subject matter jurisdiction pursuant to 28 U.S.C. §

1331 because the issue was a question arising under the United States Constitution.

The District Court ruled against Petitioner's motion for summary judgment and instead ruled in favor of Respondent's motion for summary judgment on December 6, 2001. App. B. Petitioner appealed to the Ninth Circuit, which affirmed the district court opinion. App. A. Petitioner was denied a rehearing en banc on July 23, 2003. App. C and has filed this petition for a writ of certiorari within ninety days of the rejection of the petition for rehearing.

REASONS FOR GRANTING THE PETITION

1. *Tashjian* Is This Court's Most Analagous Precedent, Which The Ninth Circuit Partially Ignored And Partially Stood On Its Head, Whose Application To The Present Case Mandates A Different Discussion And Result.

The Ninth Circuit opinion fails to discuss *Tashjian* in any meaningful manner. Petitioner relies heavily on a passage from *Tashjian* that states:

> Were the State to... provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals.

Tashjian, 479 U.S. 214, 224. The dissent in *Tashjian* announces even more clearly that "[t]he ability of the members of the Republican Party to select their own candidate... unquestionably implicates an associational freedom." 479 U.S. at 235 (Scalia, J. dissenting). The Ninth Circuit failed to discuss or even recognize this important principle and thus promulgated a miscarriage of justice.

The Ninth Circuit's failure to discuss *Tashjian* led to its failure of discussing the very essence of Petitioner's case. That is, candidates and their political parties have association rights which allow parties great leeway in their candidate selection process - a case much different than the independent candidates at issue in *Storer*. However, the Ninth Circuit missed Petitioner's strongest arguments because it failed to heed the warning this Court set forth in *Storer* to closely examine the "facts and circumstances behind the law." *Storer*, 415 U.S. at 730. Indeed, the Ninth Circuit essentially held that because Diet Coke looks, smells, and tastes like Coca-Cola that they are in fact the same. That just because the language of the independent and partisan disaffiliation statutes are almost identical that the statutes themselves are identical; however, close inspection reveals fundamental differences.

"The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees." *Tashjian*, 479 U.S. at 224. *Storer* does not apply to the present case for three clear reasons. First, Petitioner was not running as an independent candidate. Second, the Libertarian Party welcomed Petitioner into their primary election by passing a Party resolution to allow his entry. Third, Petitioner could not possibly be an unsuccessful putative party nominee because he only entered one primary election. Just as Coca-Cola and Diet Coke have different effects on body weight, the independent disaffiliation statute upheld in *Storer* has a vastly different effect on ballot access than does the Cal. Elec. Code § 8001(a)(2). Essentially, the statute in *Storer* prevented a candidate who failed in a primary to become an independent candidate; however, for the case at bar the Libertarian Party opened its primary for Petitioner so that it could choose its most qualified bearer of ideals. This foremost association right was not existent in *Storer* and is the crux of the present matter. This difference mandates close scrutiny but even a cursory discussion of the

balancing test would have prevented the Ninth Circuit's unreasoned and incomplete discussion.

2. Balancing The Character And Magnitude Of Plaintiff's Burden With The State's Interests Via Strict Scrutiny.

Strict Scrutiny is the proper analysis to use when the fundamental First Amendment Association right as this Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780 (1983)(An early filing deadline for a Presidential election was struck down as it violated First and Fourteenth Amendment rights). When looking at the character and magnitude placed upon Petitioner, this Court has recently held that political parties have a vast amount of power to associate with their prospective candidates.

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.' The moment of choosing the party's nominee, we have said, is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'

California Democratic Party et. Al. v. Jones, 530 U.S. 567, 575 (2000)(internal citations omitted). It is undisputed that Petitioner was prevented ballot access even though his political party took internal steps, by passing a resolution, to allow him to run in the face of Section 8001. This burden is the most severe possible as this Court recognized that "[t]here is simply no substitute for a party's selecting its own candidates." *Id.*

The Ninth Circuit failed to discuss *Jones* in its opinion and thus failed to properly discuss the severity of the

burden imposed on the petitioner even though the burden placed on candidates and their parties are the most severe possible. After recognizing this, the State interests are to be looked at and compared. Instead of following the test, the Ninth Circuit addressed at length the value of the statute in *Storer* yet failed to connect how those valid interests in *Storer* apply in a partisan context.

Indeed, Defendant did not introduce one shred of evidence nor one original argument as to exactly how or why the political system was more stable because of preventing Petitioner ballot access. Petitioner agrees that the State interests in maintaining integrity of the electoral process and protecting political stability are valid interests, but questions how either of those interests are advanced by preventing his candidacy. This question is not answered by the Ninth Circuit opinion, yet it is wholly necessary to determine what exact State interests are advanced by Section 8001(a)(2) and to ultimately determine its constitutionality.

The Ninth Circuit claims that Section 8001(a)(2) protects stability because it prevents candidates prompted by short-range political goals or personal quarrels. App. A3. Petitioner changed parties 18 months before the general election seeking to enter only the Libertarian primary. In *Storer*, the candidates were rightfully prevented access because they did not seek to join the primary process as Petitioner has, but instead sought to disrupt it by attempting a second chance at ballot access. Therefore the valid interest in *Storer* is nothing but a phantom interest for the present case, the Ninth Circuit believed it existed even though it had no rational ground to do so. Further still, this phantom interest holds no weight because the primary dates have changed so much that Petitioner would have been eligible for ballot access under *Storer*, which only required 17 months of disaffiliation before the general election.

Because the present case deals with a fundamental right, strict scrutiny requires that the compelling interest be narrowly tailored. The Ninth Circuit has not shown how last

second party switching is a bane to the State, but even if it is, Section 8001(a)(2) is the sledge hammer used to kill a fly. By requiring nearly 2 years of disaffiliation California is so extreme that if any of its fifty three house members sought to switch parties any time after being elected they would not be eligible to run for re-election. California would have prevented the candidacies of these successful party switchers: Strom Thurman, Ben Nighthorse, Billy Tauzin, Virgil Goode, and dozens more which the Court is likely familiar with. The Court must further consider that forty seven States require zero days of disaffiliation, West Virginia requires 60 days, Rhode Island requires 90 days, and California requires 365 days. This must tip the scales against the necessity of the law when performing the balancing test.

Even so, the Ninth Circuit does not address if a less restrictive means exist for accomplishing the same goal, a discussion which is mandated under strict scrutiny. Clearly the most simple less restrictive means available would be for California to follow the lead of Colorado and specifically grant to each political party the ability to choose disaffiliation requirements for its candidates.

3. *Storer* Has Been Distinguished To Near Death And Its Exact Holding Must Be Clarified And Reconciled With Subsequent Cases.

The Ninth Circuit has taken *Storer*, a case that has lost its bite, and placed teeth in it far in excess of how this Court has viewed it. *Storer* itself stated that its holding was narrow, "[i]n any event, neither Storer nor Frommhagen is in position to complain that the waiting period is one year, for each of them was affiliated with a qualified party no more than six months prior to the primary. As applied to them, § 6830(d)(Supp. 1974) is valid." *Storer*, 415 U.S. at 734. Even more important is the passage from *Tashjian* which states that "[t]he statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect

of independent candidacies launched by unsuccessful putative party nominees." *Tashjian*, 479 U.S. at 224. *Tashjian* does not say *Storer* was designed to prevent candidates who take steps to obtain ballot access 18 months before an election, who only file for one primary election, should be prevented access, especially when their party encourages said candidacy. The Ninth Circuit, however, stretched *Storer* to ludicrous lengths. *Anderson* attempted to, and did, distinguish itself from *Storer*.

> Refusing to own up to the conflict its opinion creates with Storer, the Court tries to distinguish it, saying that it 'did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters.'

Anderson, 460 U.S. 780, 814 (Rehnquiest, CJ., dissenting). If the Court were to say that *Storer* today stands for allowing states to pass sore loser statutes (like Section 8301) and that these statutes can attach at the moment a candidate files for ballot access, it would satisfy *Storer*, *Jones*, *Anderson's* stinging dissent, and *Tashjian*. "The [disaffiliation statute] was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees." *Tashjian*, 479 U.S. at 224.

The Court could, in the alternative, hold that the candidates in *Storer* did not have a sufficient modicum of support for an association right to attach which would again distinguish it from the present case and all of the association cases which the State has lost. *Storer* then would remain a non-association case and would hold disaffiliation and like provisions are valid when they do not interfere with association rights.

CONCLUSION

"The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections. Madison noted that 'it was impossible to foresee all the abuses that might be made of the discretionary power.'" *Term Limits v. Thornton*, 514 U.S. 779, 808 (citing 2 Farrand 240) (1995). California, the only State that would have prevented Petitioner's candidacy, is abusing its powers to regulate elections by infringing on Petitioner's right to associate with his political party. Any alleged State interest is minimal if even existent at all, considering that Petitioner sought only to enter one primary election. Candidates avail themselves to public scrutiny and in the era of twenty-four hour news, readily available internet connections, and perpetual multi-million dollar campaigns, the voters have a plethora of information about each candidate. So being, the voters in each primary election are in the best position to decide who best would represent them in the general election, a matter not for the State to decide.

This case is especially timely due to the recent developments in election law cases and situations. General Wesley Clark recently decided to run for President as a Democrat although he also considered other parties. Like Clark, Governors Ventura and Schwarzenegger were popular candidates who could have won office as a member of a different political party. Without associating with a political party those three could not have become the political force they are today, but Ventura and Clark may have been prevented from obtaining California ballot access if they did switch parties two years before the general election. These types of candidates would be barred even though a certain fluidity in American politics exists as evidenced by several

party switching candidates including Senator Jeffords[1] recent change from Republican to Independent. While the association right is paramount, it is equally important to allow candidates, voters, and parties the ability to change their allegiances so that common ideals can be promulgated. If allowed to stand, Section 8001 prevents this fundamental association right in order to discourage competition for California incumbents - an "interest" which the State should protect against, not encourage, and the Court cannot allow to stand.

So being, the petition for certiorari should be granted.

Respectfully Submitted.

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[1] If Jeffords were a California Congressman or a Senator with only two years left, he could not run as a partisan candidate in that State – but would be eligible in all other forty-nine.

APPENDIX A

USCA No. 01-57210

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADAM VAN SUSTEREN
Appellant and Plaintiff,

v.

BILL JONES, in his official capacity as California Secretary of State,
Appellee and Defendant.

Argued and Submitted: April 10, 2003
Filed: June 6, 2003

Before: SCHROEDER, Chief Judge, GRABER, Circuit Judge, and Singleton, District Judge.[1]

OPINION:

MARY M. SCHROEDER, Chief Judge:

Adam Van Susteren filed this action in federal district court seeking to be listed on the ballot as a Libertarian Party candidate in the March 2002 primary election for California's

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[1] The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

53rd District seat in the United States House of Representatives. The defendants, the California Secretary of State and the San Diego Registrar of Voters, denied Van Susteren a place on the ballot because he did not meet the disaffiliation requirement in California Elections Code § 8001. The disaffiliation provision requires partisan candidates to have been disaffiliated from membership in other political parties for one year prior to filing for primary ballot access.[1] *See* Cal. Elec. Code § 8001(a)(2).

Van Susteren did not meet the disaffiliation requirement because he had been registered as a Republican within the preceding twelve months. The district court rejected Van Susteren's constitutional challenges to section 8001 and granted summary judgment in favor of the defendants. We affirm because the district court correctly held that this case is not materially distinguishable from the Supreme Court's opinion in *Storer v. Brown*, 415 U.S. 724, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974).

A. Associational Rights Challenge

Van Susteren first contends that the disaffiliation requirement is invalid under the First Amendment on the theory that it impermissibly burdens the rights to vote and to associate politically. In *Storer*, the Supreme Court upheld a similar disaffiliation requirement that applied to independent candidates. 415 U.S. at 726, 736. It required them to be disaffiliated from any party for one year prior to the preceding primary election. *See id.* The Court concluded that the disaffiliation requirement was aimed at preserving the

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[1] The disaffiliation provision states:
No declaration of candidacy for a partisan office . . . shall be filed, by a candidate unless . . . the candidate has not been registered as affiliated with a qualified political party other than that political party the nomination of which he seeks within 12 months . . . immediately prior to the filing of the declaration.

integrity of the various means of getting on the ballot, and that it thus furthered the state's interest in maintaining a stable political system. *See id.* at 733, 736. The Court said this interest was "not only permissible, but compelling." *Id.* at 736.

The disaffiliation requirement imposed on partisan candidates similarly serves California's interest in maintaining the stability of the state's political system. Requiring candidates' disaffiliation from other parties during the preceding twelve months encourages stability by discouraging candidates from making a partisan affiliation on the spur of the moment. Such candidates, in the Supreme Court's words, may be "prompted by short-range political goals, pique, or personal quarrel." *Id.* at 735. The interest in a stable electoral process outweighs any interest the candidate or his supporters may have in making last-minute affiliation decisions. *See id.* at 736; *see also Rosario v. Rockefeller*, 410 U.S. 752, 761-62, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973) (upholding voter disaffiliation requirements because they preserve the "integrity of the electoral process").

Van Susteren contends that *Storer* is not controlling because a disaffiliation requirement imposes a greater burden on associational rights when applied to candidates affiliated with a political party than it does when applied to independent candidates. In upholding the disaffiliation provision in *Storer*, however, the Supreme Court observed with approval that the California Elections Code imposed almost identical disaffiliation requirements on partisan and independent candidates. *See Storer*, 415 U.S. at 733. This passage suggests that disaffiliation is a neutral requirement that imposes a similar burden on both types of candidates.

Van Susteren also contends that § 8001 is an impermissible attempt to regulate the Libertarian Party's internal affairs. The Supreme Court has recognized that states' authority to

regulate parties' internal selection of candidates is limited. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986). The disaffiliation requirement does not regulate political parties' internal affairs, however, but is aimed at protecting parties from disruption by outsiders. *See id.* The district court therefore correctly held that § 8001 does not impermissibly burden rights protected by the First Amendment.

B. Equal Protection Challenge

Van Susteren also argues that the disaffiliation provision violates the Equal Protection Clause. He contends that partisan candidates and independent candidates are treated differently because the effect of the requirement, when imposed on candidates in a party primary election, is to require partisan candidates to be disaffiliated for twenty-three months prior to the general election, while independent candidates need only be disaffiliated for thirteen months prior to the general election.

To sustain his challenge on equal protection grounds, Van Susteren must establish that the two groups, partisan and independent candidates, are similarly situated with respect to the routes they must take to get on the general election ballot. *See Colo. Libertarian Party v. Sec'y of State of Colo.*, 817 P.2d 998, 1006 (Colo. 1991) (rejecting equal protection challenge to a disaffiliation requirement where groups were not similarly situated under the state election code). These two groups are not similarly situated. Party candidates must run in a primary election, which is integral to the election process because it serves the important function of winnowing out competing partisan candidates. *See Storer*, 415 U.S. at 735. By contrast, an independent candidate need not, and indeed may not, participate in a party primary in order to be on the general election ballot. *See* Cal. Elec. Code § 8301.

The more appropriate comparison is therefore between the disaffiliation period before the primary election for partisan candidates and the disaffiliation period before the general election for independent candidates. These periods are essentially similar. Partisan candidates must disaffiliate one year before they file for the primary election. *See* Cal. Elec. Code § 8001(a)(2). One year is not significantly different than the thirteen-month period in which independents must be disaffiliated before the general election. *See* Cal. Elec. Code § 8550(f). There is no equal protection violation.

C. Qualifications Clause

Van Susteren's final argument is that California has violated the Qualifications Clause by adding disaffiliation from a political party as a qualification for a position in the House of Representatives.[1] States lack the power to add qualifications for members of the House of Representatives beyond those found in Article I, Section 2, Clause 2. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783, 131 L. Ed. 2d 881, 115 S. Ct. 1842 (1995). The Supreme Court has explicitly stated, however, that the disaffiliation provision at issue in *Storer* was constitutional because it "regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." *Id.* at 835. In this regard *Storer* is indistinguishable from this case. Thus, § 8001(a)(2) does not violate the Qualifications Clause.

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[1] The Qualifications Clause states, "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2.

Conclusion

The district court correctly held that the disaffiliation requirement in § 8001(a)(2) does not violate the Constitution of the United States. The district court's grant of summary judgment in favor of the defendants is AFFIRMED.

APPENDIX B

USCA No. 01-57210

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ADAM VAN SUSTEREN, Plaintiff,

v.

BILL JONES, in his official capacity as California Secretary of State; **SALLY MCPHERSON,** in her official capacity as Registrar of Voters, Defendants.

December 6, 2001

ORDER

Plaintiff Adam Van Susteren ("Van Susteren" or Plaintiff) has filed a Motion for Summary Judgment. Defendant Sally McPherson, Registrar of Voters, has filed a Cross Motion for Summary Judgment. Defendant Bill Jones, California Secretary of State, has requested the Court grant, sua sponte, summary judgment in his favor. For the reasons discussed below, Plaintiff's motion is DENIED and Defendant's Cross Motion for Summary Judgment is GRANTED.

I. BACKGROUND

Plaintiff is seeking access to the ballot for California's March 2002 primary election as a Libertarian Party candidate for member of the House of Representatives.

Plaintiff has support for his candidacy from the chairman of the San Diego Libertarian Party, as well as other members of the San Diego Libertarian Party Executive Committee. (Teyssier Decl. p 2,4.)

Van Susteren has affiliated with several different political parties over the past year. On October 3, 200, Van Susteren was registered to vote as a Republican in California. On May 29, 2001, he registered as Undeclared. Finally, on June 19, 2001 Plaintiff registered as a Libertarian.

On September 20, 2001, Kathy Glaser of the Registrar of Voters informed Van Susteren that his candidacy would not be valid because of his failure to meet California Elections Code § 8001, a disaffiliation statute, which provides in relevant part:

> (a) No declaration of candidacy for a partisan office... shall be filed, by a candidate unless (1) at the time of the presentation of the declaration and continuously for not less than three months immediately prior to that time...the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a qualified political party other than that political party the nomination of which he seeks within 12 months...immediately prior to the filing of the declaration.

Plaintiff may seek election to the House of Representatives as a write-in candidate. Plaintiff filed this action on October 2, 2001. He challenges the constitutionality of Cal. Elec. Code § 8001, particularly the state's disaffiliation requirement in section 8001(a)(2).

II. DISCUSSION

Plaintiff argues that California Elections Code § 8001(a)(2) is unconstitutional under the Qualifications

Clause, the First and Fourteenth Amendments and the Equal Protection Clause of the United States Constitution. Defendants argue that section 8001(a)(2) is constitutionally valid because the United States Supreme Court upheld a California disaffiliation statute virtually identical to section 8001(a)(2) in Storer v. Brown, 415 U.S. 724 (1974).

In Storer, two individuals, Storer and Frommhagen were disqualified from running as independent candidates for Congress under former section 6830(d) of the California Elections Code. That statute required an independent candidate for Congress to have been disaffiliated from any political party for one year prior to the immediately preceding primary election:

> Each candidate or group of candidates shall file a nomination paper which shall contain:...(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately proceeding primary election at which a candidate was nominated for office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430.

Cal. Elec. Code § 6830(d). Storer and Frommhagen argued that the disaffiliation provision violated their First and Fourteenth Amendment rights.

The Court evaluated the one-year disaffiliation statute under strict-scrutiny analysis. The Court noted that state statutes that place a substantial burden on the right to associate for political purposes are "constitutionally suspect and invalid under the First and Fourteenth Amendment and under the Equal Protection Clause unless essential to serve a compelling state interest." Storer, 415 U.S. at 729. However, the Court also noted that states have authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. Art. I § 4, cl. 1, and may regulate elections, in a substantial way, to ensure they are fair, honest, and orderly. Id. at 730.

The Court upheld the disaffiliation statute as furthering the state's interest in the stability of its political system, stating: "We also consider that interest as not only permissible, but also compelling and as outweighing the interest the candidate and his supporters may have in making later rather than an early decision to seek independent ballot status. Nor do we have reason for concluding that [the statute] was not an essential part of its overall mechanism to achieve its acceptable goals." Id. at 736.

Furthermore, the Court held that section 6830(d) of the Elections Code did not discriminate against independents because the disaffiliation requirement was identical to the requirements placed on party candidates under section 6401. Id. at 733. Section 6401 is the predecessor to the California Elections Code section 8001, and contains the same twelve month disaffiliation requirement.

The Court assesses the constitutionality of a state elections law by first examining whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest. Eu v. San Francisco Democratic Central Committee, 489 U.S. 214, 222 (1989). Plaintiff argues that the state interests advanced by section 8001(a)(2) are insufficiently compelling to justify the substantial burden it places on his First Amendment rights. Defendants argue that the disaffiliation statute in dispute maintains the integrity of the electoral process, which is the same purpose advanced by the disaffiliation statute upheld in Storer. According to Defendants, the disaffiliation requirement protects the public by insuring that the candidate truly represents the views of the party whose nomination the candidate seeks.

Under the first prong, Van Susteren argues that section 8001(a)(2) burdens his First Amendment rights of freedom of association and ballot access. The Court

disagrees that the statute restricts Plaintiff's ability to associate with the political party of his choice. Section 8001(a)(2) does not regulate the internal functioning of political parties; rather it protects political parties from external disruption. See Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 224 (1986)(distinguishing the disaffiliation statute upheld in Storer with a Connecticut statute that prevented the parties from taking internal steps affecting their own process for the selections of candidates). Plaintiff may freely associate with the Libertarian Party as a member and office-holder. On the other hand, the Court agrees that section 8001(a)(2) burdens Plaintiff's First Amendment right of ballot access, despite the availability of a write-in candidacy. The Court must therefore determine whether section 8001(a)(2) passes constitutional muster under strict scrutiny.

The Supreme Court upheld the analogous disaffiliation statute in Storer under strict scrutiny analysis:

> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of the political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot access. Nor do we have reason for concluding that the device California chose, $ 6830(d)(Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals.... [T]he Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates

> and their supporters having instantaneous access to the ballot.

Storer, 415 U.S. at 736. Section 8001(a)(2) advances the same state interest in maintaining the integrity of the electoral process as the disaffiliation statute analyzed by the Supreme Court in Storer. Thus, unless the statute is materially distinguishable from the disaffiliation statute upheld in Storer, section 8001(a)(2) must be upheld.

Plaintiff cites two reasons why Storer is not controlling. First, Plaintiff argues that because the primary dates have changed, section 8001(d), in application, requires an additional seven months of disaffiliation than required when Storer was decided. This argument is unavailing. While there would certainly be a length of time at which the state's disaffiliation requirement would become an impermissible burden,[1] seven additional months does not cross that line. Instead, the state interest served by the disaffiliation requirement continues to outweigh the interest Plaintiff has in "making a late rather than early decision" to seek Libertarian ballot status. Storer, 415 U.S. at 736.

Second, Plaintiff argues that the Storer court limited its decision to upholding the disaffiliation statute as applied to plaintiffs Storer and Frommhagen. Indeed, the Storer court noted that neither plaintiff was in a position to complain that the waiting period is one year, since each had been disaffiliated for only six months, and, "as applied to them," the disaffiliation statute was valid. See Storer, 415

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[1] For example, in the context of voter registration, the Supreme Court has upheld an 11-month waiting period, but held a 23-month waiting period unconstitutional. Compare Rosario v. Rockefeller, 410 U.S. 752 (1973)(upholding an 11-month waiting period for voters who wanted to change political parties) with Kusper v. Pontikes, 414 U.S. 51 (1973)(striking down a 23-month waiting period for voters who wanted to change political parties). However, the one-year disaffiliation statute is distinguishable from a waiting period for voters. The State's interest protecting the public from fraudulent campaigns with a disaffiliation requirement is superior to its interest in maintaining ordered voter registration.

U.S. at 734. The Court does not take such a narrow view of Storer. The Storer court upheld the one-year disaffiliation requirement of the challenge statute. Id. at 736. ("We conclude that [the disaffiliation statute] is not unconstitutional, and Storer and Frommhagen were properly barred from the ballot as a result of its application.") Van Susteren's First Amendment challenge is therefore controlled by Storer.

Plaintiff's Equal Protection Clause challenge is similarly controlled by Storer, which upheld a virtually identical disaffiliation statute under an equal protection challenge. Plaintiff appears, however, to make an additional argument as to why section 8001(a)(2) violates equal protection. He argues that California is one of only nine states with such a disaffiliation requirement and, of those nine states, California's one-year disaffiliation requirement is the longest and most burdensome. Consequentially, Plaintiff would be eligible to run for Congress in any other state besides California.

The Equal Protection Clause states: "No State shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV § 5. The clause does not direct states to enact the same laws as each other.[1] The State of California may therefore require more stringent disaffiliation requirements for political candidates so long as its statutes do not violate federal law.

Van Susteren also contends that section 8001(a)(2) violates the Qualifications Clause by adding a length of nonaffiliation with another party as a qualification for the position of a member of the House of Representatives. The Qualifications Clause sets forth the requirements for membership in the U.S. House of Representatives:

> No Person shall be a Representative who shall not have attained the Age of twenty five

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[1] For example, an individual in Nevada does not state a cause of action under the Equal Protection Clause by arguing that Nevada's air quality laws are inadequate compared to those in California.

> Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

U.S. CONST. Art I, § 2, cl. 2. States may not "supplement the exclusive qualifications set forth in the text of the Constitution." U.S. Term Limits v. Thornton, 514 U.S. 779 (1995). Term Limits sets forth a two-step inquiry to determine whether the state statute violates the Qualifications Clause. First, states may not create an absolute bar to candidates who would otherwise meet the requirements of the Qualifications Clause. Schaefer v. Townsend, 215 F.3d 1031, 1035 (9th Cir. 2000). Second, the reviewing court must determine whether the statute "has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." Id.

The parties agree that section 8001(a)(2) does not create an absolute bar to Van Susteren's candidacy but disagree whether the provision has the likely effect of handicapping an otherwise qualified class of candidates. Plaintiff argues that his candidacy is handicapped because California is the only state with a one-year disaffiliation requirement. Furthermore, he argues that the provision fails to prevent frivolous or fraudulent candidacies. Defendants, on the other hand, argue that the Supreme Court has already determined that the virtually identical disaffiliation statute upheld in Storer does not violate the Qualifications Clause. Furthermore, Defendants argue that section 8001(a)(2) is a permissible application of states' authority to prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives," U.S. CONST. Art I, § 4, cl. 1.

The Supreme Court in Term Limits reaffirmed Storer and, in striking down Arkansas' term limits constitutional amendment as a violation of the Qualifications Clause, distinguished the disaffiliation statute at issue in Storer. The Court stated:

> The provisions at issue in Storer and our Elections Clause cases were thus constitutional because the regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position. They served the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service of Congress. And they did not involve measures that exclude candidates from the ballot without reference to the candidates support in the electoral process.

Term Limits, 514 U.S. at 835.

The Ninth Circuit has similarly cited Storer as permissible of the state's right to maintain order in its election proceedings. In Schaefer v. Townsend, supra, the Ninth Circuit struck down a state elections law that required candidates to establish state residency well in advance of the election as unconstitutional under the Qualifications Clause. The residency requirement in Schaefer could not be justified because, unlike the disaffiliation statute in Storer, it was not related to the state's right to maintain order in elections proceedings. Schaefer, 215 F. 3d at 1037 (distinguishing Storer).

As discussed above, section 8001(a)(2) is materially indistinguishable from the statute upheld in Storer. In light of the reaffirmace of Storer in both Term Limits and Schaefer, section 8001(a)(2) does not create an additional substantive qualification as to render the disaffiliation statute unconstitutional.

Finally, Plaintiff argues that even if section 8001(a)(2) is upheld, the Court should hold it unconstitutional as applied to him. The Court recognizes that Plaintiff has received the support of several high ranking

members of the San Diego Libertarian Party. On the other hand, Plaintiff has affiliated with three political parties in the last year and has been registered as Libertarian for six months. Given the present record, section 8001(a)(2) is properly applied to bar Plaintiff's candidacy in order to "maintain order" in the electoral process.

III. CONCLUSION

For the reasons discussed above, Plaintiff's Motion For Summary Judgment is DENIED. Defendants' Motion for Summary Judgment is GRANTED. Because the Court upholds the constitutionality of section 8001(a)(2) the complaint against Bill Jones is dismissed with prejudice. The clerk shall enter judgment dismissing Plaintiff's complaint with prejudice.

IT IS SO ORDERED.
Dated: December 6, 2001
HONORABLE BARRY TED MOSKOWITZ
United States District Judge /s

APPENDIX C

USCA No. 01-57210

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADAM VAN SUSTEREN
Appellant and Plaintiff,

v.

BILL JONES, in his official capacity as California Secretary of State,
Appellee and Defendant.

July 28, 2003

ORDER

Before: SCHROEDER, Chief Judge, GRABER, Circuit Judge, and Singleton, District Judge.[1]

The panel has voted to deny appellant's petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

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[1] The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.